CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: January 4, 2005

TO: NR 115 Advisory Committee Members

FROM: Carmen Wagner, WT/2

SUBJECT: Comments and Responses on the Fourth Draft (November Draft) of Changes to Ch. NR 115, Wis. Admin. Code

The summary provided below includes comments received from advisory committee members at the November advisory committee meeting, as well written comments provided by advisory committee members after the meeting. The comments have been separated out by sections in the proposed rule, and have been condensed to avoid repetition. A response to the comments is provided to explain how the fourth draft was changed to produce the fifth draft as a result of the comments or why a change was not made. This document does not capture or address all the changes between the fourth and fifth drafts, because in some instances a change between drafts had cascading effects that required additional changes.

Sections

NR 115.01 Purpose 2
NR 115.02 Applicability 2
NR 115.03 Definitions 2
NR 115.05 Shoreland zoning districts 3
NR 115.07 Shoreland-wetland zoning 3
NR 115.09 Land division review 3
NR 115.11 Lot size and development density 4
NR 115.13 Shoreland setbacks 7
NR 115.15 Shoreland vegetation 8
NR 115.17 Land disturbing activities 11
NR 115.19 Nonconforming uses and structures 11
NR 115.21 Impervious surfaces 13
NR 115.23 Adoption of administrative and enforcement provisions. 15
NR 115.25 Department duties 15
General Comments 15

NR 115.01 Purpose

C1: The words "need to" should be struck from subsection (4). Otherwise the phrase implies that in some undetermined instances that county compliance with the letter of NR 115 will be insufficient to satisfy statutory requirements.

R: The new proposed minimum standards in NR 115 have been developed based on consideration of average shoreland conditions, and the Department recognizes that there will be circumstances where county compliance with the minimum standards in NR 115 will not satisfy the objectives of ss. 281.31 (1) and (6) and will not adequately protect local resources. That is why this provision in s. NR 115.01 (4) has been added. It should be noted, however, that this general directive leaves considerable discretion in the hands of county officials to determine when more protective measures are required. The alternative would be for the Department to amend NR 115 to require all counties to comply with more stringent minimum standards than are generally necessary, in order to ensure that the most sensitive shoreland areas are adequately protected.

NR 115.02 Applicability

C2: The note on page two refers to buildings, structures or facilities that are constructed by a state agency for the benefit of the general public are not required to comply with local zoning ordinance under s.13.48. The pertinent paragraph says…. shall be in compliance with all applicable state laws, rules, codes and regulations but the *construction* is not subject to the ordinances or regulations of the municipality in which the construction takes place *except zoning,* including *without limitation* because of enumeration ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, *or other restrictions*. How can a County loose the authority granted by statute in a NR rule?

R: The note is consistent with s. 13.48, Wis. Stats., and does not go beyond the intent or authority of the statute. The paragraph that you quote from s. 13.48 (13), Stats., provides that if a building or other facility is "constructed for the benefit of or use of the state" (rather than for the benefit of the general public), state agencies are required to comply with, and obtain all necessary zoning permits. The note is intended to clarify the situations where s. 13.48 (13), Stats., applies and does not apply.

NR 115.03 Definitions

C3: Use consistent language for providing examples in definitions. Current uses "…includes, but are not limited to…", "…includes…", and "examples of…".

R: Definitions were changed to consistently use "includes" as recommended by the Revisor of Statutes and the Legislative Council Rules Clearinghouse.

C4**:** Floodplain definition needs to be tied to a map prepared properly as directed in state statute or as prepared by FEMA.

R: The floodplain definition has been amended to refer to the county's official floodplain zoning maps.

C5**:** Impervious surface definition includes gravel and crushed stone. In our County these are not considered impervious as the underlying soils are deep and well drained. Gravel and crushed stone should only be considered impervious when the underlying soils are heavy or compacted.

R: Compacted surfaces, such as gravel driveways, will impend the infiltration of storm water runoff to some extent and are included as an example of an impervious surface.

C6: Mobile home park definition includes a manufactured home. Does this mean any manufactured home has to be in a park as defined in 101.935?

R: No. The definition of mobile home park does not limit manufactured home placement to mobile home parks. It simply means that a mobile home park can include manufactured homes as well as mobile homes.

C7: Open fence as defined leaves one to wonder why not just preclude fencing from the shoreland area. Fencing has a purpose whether for privacy, protection or simply the demarcation of a boundary. Shoreland residents are due these rights or protections as any other landowner.

R: Open fences are allowed within the secondary buffer and other fences may be placed at least 75 feet back from the ordinary high-water mark, consistent with the shoreland setback required for other structures.

C8: Principal structure as defined includes attached garages and porches. Does a porch have a limited size before it becomes a deck? Is there some size limitation here?

R: A definition for "porch" was added to differentiate it from "deck".

C9: In the definition of "structure", the lists of what are and are not included as a "structure" do not provide enough guidance for items not listed. For instance, the list of "structures" leaves out canoes, kayaks, boats, and related recreational gear, etc. Some are not easily moved by hand, and are surely heavier and larger than the largest and heaviest item in the current excluded list. How do envision the rule treating these and other items?

R: A reference to canoes, kayaks and temporary snow fences was added to the list of "small objects that are easily movable by hand" that are not included in the definition of "structure." Flagpoles were removed from this list of "small objects," but flagpoles were added to s. NR 115.13 (5), so that counties are able to exempt them from the shoreland setback if they choose to do so.

C10: Wetland setback area as defined and the setback as proposed will call into question the placement of thousands of structures and their legal designation. It would also preclude the placement of elevated recreational buildings on marginal land for hunting purposes. Wetlands are large filters. The placement of these buildings might be offensive to some but do no damage and are a legitimate use of these areas. Counties that have a large proportion of lands with perched water tables, which technically fall under this definition, would suffer consequences that are incalculable. To be blunt, wetland setbacks are a land grab.

R: The wetland setback language was struck and replaced with a wetland buffer provision in s. NR 115.19 that prohibits land disturbing activities within 10 feet of the boundary of any wetland in the shoreland.

NR 115.05 Shoreland zoning districts

NR 115.07 Shoreland-wetland zoning

C11: Permitted uses in the shoreland area. In a paragraph on page 9 of the draft, flooding dike, dam construction and ditching shall be allowed for the growing of cranberries. Why not rice? Why not muck crops? Also does agricultural cultivation also include silvacultural activities? Our tamarack trees are of a size to harvest in the near future. Will we be able to harvest these trees?

R: There are no changes proposed to the shoreland-wetland zoning regulations and the above uses would be continued to be allowed as historically allowed. In the existing shoreland-wetland

zoning regulations, the practice of silviculture, which includes the harvesting of timber, is a permitted use. The Advisory Committee decided that changes to shoreland-wetland zoning were beyond the scope of this revision.

NR 115.09 Land division review

(3) Navigable bodies of water within lots

C12: Clarify how this proposal applies to existing lots that are divided by streams.

R: A clarifying note was added that explains that this provision does not affect the use of existing lots or parcels and does not prohibit the sale of lots or parcels divided by a stream, or the sale of a portion of a lot or parcel that is separated from the remainder of the lot or parcel by a navigable stream.

C13: Keep this in to clarify how these situations should be handled.

R: Please refer to response for Comment 12.

C14: Do not include in NR 115.

R: Please refer to response for Comment 12.

C15: This is problematic because many riparian landowners hold small tracts of land on the opposite side of the waterway from their primary lands which would not be alienable under the current rule. We believe that the Attorney General's Opinion is incorrect as a matter of law and policy. First, riparians do own stream beds. Second, the Opinion reached its conclusions because it assumes that all rivers and streams render the land on opposite sides "not susceptible to integration". In fact, the basis of this whole Opinion depends on that characteristic. Due to the liberal definition of "navigable" that we operate under in this state, there are many situations in which the presence of a "navigable" stream dividing a lot does not break the lot's integration at all, or at most, for a very short time each year.

The rule as drafted goes beyond what the Opinion provides. The Opinion does not say that a lot cannot include land on two opposite sides of a public highway or navigable water. It only says that land on one side cannot be used to calculate minimum lot size on the other side. The Opinion only requires that the lost lot consist of enough area on one side of the divider to create a standard lot. Additional land on the other side of the divider can be added on, too.

R: Please refer to response for Comment 12. The proposed rule is consistent with the Attorney General's opinion, and is intended to minimize the potential for future problems associated with parcels divided by navigable streams.

C16: The shape and location of a navigable waterway often changes and results in a natural separation of real property. Because the course of a navigable waterway is not fixed, every property that abuts a navigable waterway is potentially impacted by this provision. As a result, this provision is of great concern because it would prevent a property owner from selling off an unbuildable section of a lot or parcel that has been separated from the remaining tract of land by a navigable waterway. If a portion of property that is inaccessible and unbuildable cannot be sold either to an abutting property owner or some other interested buyer, the value of such a property would likely decline. Furthermore, by prohibiting the sale of such unbuildable sections of land to abutting property owners, this provision inhibits the more efficient use of land, which seems counter to the principals of good stewardship.

R: Please refer to responses for Comment 12 and Comment 15.

(4) Substandard lots in common ownership

C17: Does this need to be in code, if you are just allowing it?

R: The intent of provision is to clarify that counties have the authority to regulate substandard lots.

C18: The term "common ownership" may need some clarification. My reason came from a thought, "What happens if a family of 4 inherits several contiguous substandard lots, or several contiguous substandard lots that have been put into a trust and the lots are willed to multiple members of the survivors. This is not a way out question. I came up against such a situation. There is a transfer and not a sale if I understand it correctly. Does their need to be additional language to deal fairly with such a situation. I don't think it should be considered as a sale. What if it remained in the trust with multiple owners?

R: If a county determines it needs to regulate substandard lots in common ownership, this is an issue the county would need to address, and the Department would prepare guidance on this issue with a model ordinance.

NR 115.11 Lot size and development density

(2) General

C19: This section is complicated and may be difficult for most of the general public to understand. It may be helpful to include a drawing or other visual aids to show how properties are to be measured.

R: A diagram will be included in the draft prepared for public hearings.

C20: By changing the manner in which lot-widths are measured, how will this impact existing lots that were measured in a different way? How will this impact existing lots that now do not meet the dimensional standards under the new way lots are to be measured? Will they be "nonconforming?" If so, does the department know how many lots will be impacted? If an existing lot is already developed, but does not meet the dimensional requirements under the new measuring standards, will that lot be considered "nonconforming?" Will developed and undeveloped nonconforming lots be expected to be brought back into conformity with the new standards? If so, will any limitations be placed on improvements to nonconforming developed lots?

R: If a lot does not meet the minimum area or lot width requirements, it would be considered a "substandard lot," and the residential use or other use of a parcel that does not meet the minimum lot size or lot width requirements for that use would be considered a "nonconforming use." However, section NR 115.11 (9) would allow new construction on the substandard lot if other shoreland zoning requirements, applicable to the proposed construction, are met, provided that the nonconforming use does not change. If there is existing development on the lot, the improvement or alteration of those structures would only be limited if the structures are themselves nonconforming (that is, built too close to the water). The new lot width requirements will only impact the creation of new lots and proposals to change from one nonconforming use to another nonconforming use on a substandard lot. Existing substandard lots will not be required to be brought into conformity with the new standards.

(3) Residential uses

C21: Use a reduced formula for multi-family dwellings, maybe similar to Vilas County's method.

R: The standard for multi-unit residences was altered similar to Vilas County's provisions.

C22: Continue to provide counties the option to adopt a different standard to provide more flexibility to counties.

R: Language was retained, but combined with the provision to allow counties to adopt other standards for alternative types of development, such as conservation subdivisions.

C23: Why should counties have to prove that different standards are as effective as proposed standards? Why is it necessary that the DNR approve different standards?

R: Counties must demonstrate that different standards are as effective as the proposed standards to ensure that the statutory objectives of the program are met. The Department must approve different standards as part of its oversight responsibilities for the program.

C24: If an existing development is built at a density that exceeds the proposed density – what are the implications? Are the structures nonconforming? Is the lot nonconforming? Could the structures be rebuilt?

R: The structures would only be nonconforming if they are built too close to the water or violate some other provision applicable to the structure. The lot would be considered "substandard" for the level of development (density) that is currently on it. If the density of development were decreased, the lot may no longer be substandard. Whether or not the structures could be rebuilt would depend on whether the structures would fall within the definition of "nonconforming structures" (which would make them subject to limits on alterations to nonconforming structures) and whether the owner is proposing to change the use of the structures (the use could only be changed if the lot will comply with current density standards for the new use).

C25: The changes to minimum lot standards make this provision far more reasonable. However, we are concerned about the application of these standards to all lots within the "shoreland zone." While these standards may have merit when applied to development directly adjacent to navigable waters, they seem excessive when applied to development set back a considerable distance from the shoreline (e.g., 800 + feet). We are also concerned about how these new standards will impact existing multi-family development that does not meet these standards. Will these properties be nonconforming? If so, will the department expect these nonconforming properties to eventually be brought back into conformance with the new standards? If so, what limitations will be placed on future improvements to and expansion of these properties?

R: Minimum lot size standards, like all provisions in NR 115, are applicable to the entire shoreland zone, as defined by statutes. Also, please refer to the response to Comment 24.

C26: Giving counties the flexibility to develop their own standard to meet the listed objectives is an excellent idea. However, the stated objectives are too narrow in scope. While counties should develop standards to protect water quality, wildlife habitat and scenic beauty, these should not be the only objectives. Expanding the tax base, providing employment opportunities, improving the economy, and allowing for reasonable use, enjoyment, and financial return on private property are equally as important objectives and should be part of the stated purposes. Without more balanced objectives, it will be more difficult for counties to develop more equitable land use regulations and policies.

R: Proposed changes to NR 115 reflect the statutory objectives of the program. Achieving the statutory objectives of the program does not preclude counties from trying to achieve the other objectives cited above as well.

(5) Mobile home parks

C27: Please clarify if this also apply to parks with manufactured homes.
R The definition of mobile home park includes manufactured homes.

(6) Keyhole lots

C28: Please clarify how this applies to existing keyhole lots versus new keyhole lots.
R: Language was added to clarify how this applies to existing keyhole lots.

C29: Clarify if this is consistent with Ch. 30 regulations on transfer of riparian rights.
R: Language was added to clarify the proposed keyhole standards as well as the requirements of Chapter 30, Wis. Stats.

C30: It is important that structure that provide access and safety, prevent erosion, and provide enjoyment of riparian rights continue to be allowed on each keyhole lot.
R: The proposed standards do not prohibit the construction of structures on keyhole lots.

C31: At the last meeting, the department stated that this provision did not apply to existing access rights. This provision should be clarified to reflect this intent.
R: Please refer to the response for Comment 28.

(7) Other uses

C32: This subsection eliminates a landowner's ability to create a lot that is substandard, even if the construction of a principal structure will not be allowed. There are no good policy reasons for this restriction, as long as frontage width requirements are met. We must not lose sight of the purpose of these rules or we'll end up crafting restriction that unfairly burden a landowner's decisional authority and at the same time not forward the goals of this process.
R: The existing standards in NR 115 require all lots to meet the minimum lot size standards. The proposed revision to NR 115 will continue to require this, so the ability of a landowner to create a substandard lot was not eliminated because the ability has not existed since counties first adopted shoreland zoning ordinances in the late 1960s or early 1970s. However, the new section NR 115.11 is only intended to apply to lots or parcels where the construction or placement of a structure is allowed. Outlots (unbuildable parcels) that do not meet the minimum lot size or development density standards in section NR 115.11 may be created as part of a subdivision plat and a certified survey map, provided that their use is clearly restricted to nonstructural uses.

C33: This provision seemingly lots from being used for commercial, industrial, agricultural, conservation, or recreational purposes unless it is 20,000 square feet and a minimum width of 100 feet. Does this apply to both new and existing lots? Developed and undeveloped lots? If it applies to existing lots, will these lots be nonconforming? Will such nonconforming lots be expected to eventually be brought back into conformity? What, if any, restrictions will be placed on the improvement or expansion of structures on these lots?
R: Please refer to the response for Comment 24.

(8) Alternative development

C34: Can this be combined with (3)(c) for multi-unit standards?
R: Language was modified as suggested.

C35: Are additional setback and buffer requirements necessary?
R: To balance the higher density of development that would be allowed if the lot size requirements were reduced, the setbacks and buffers should be increased.

NR 115.13 Shoreland setbacks

(2) General

C36: Remove the wetland setback requirement. It may have a huge economic impact and will create many new nonconforming structures and possibly unbuildable lots. May also encourage wetland filling to avoid setback issue.

R: Language was struck.

C37: Replace wetland setback with a buffer for land disturbing activities adjacent to wetlands.

R: Language was modified as suggested (see Land Disturbing Activities provisions.)

C38: Who will delineate wetlands?

R: Initial wetland determinations can be made off of the Wisconsin Wetland Inventory maps, however, field determinations of the wetland boundary will continue to be required. A county may require a wetland delineation by the property owner as part of a permit, or may have staff on hand to do the wetland delineation. The responsibility should be spelled out in the county's shoreland zoning ordinance.

C39: Based upon the last meeting, the "50-foot setback from wetlands" is very controversial. If the department is working towards developing a rule package that is supported by a sizable majority of the advisory group, it seems counter productive to include this provision for the first into the fourth draft of this rule.

R: Please refer to response for Comment 36.

(4) Structures that counties may exempt

(b) Walkways, stairways and lifts

C40: The rule draft only allows one stairway **or** lift per 5 dwelling units. This section should allow only one stairway, and a lift if needed. Placing a lift adjacent to an existing stairway may not be the safest or best place for it. We suggest you use the following language:

> 2. Only one stairway ~~or lift~~ may be allowed on a lot or parcel of land with up to 5 dwelling units~~, except where there is an existing stairway and the lift will be mounted onto, or is immediately adjacent to, the existing stairway.~~ For properties with more than 5 dwelling units, one additional stairway ~~or lift~~ may be allowed for each additional 5 dwelling units. A lift may be allowed where necessary to provide reasonable accommodation. When practicable, the lift shall be mounted onto or placed immediately adjacent to any existing stairway.

R: Language modified as suggested.

(c)Signs

C41: Does this provision apply to both permanent and temporary signs? How will a county's sign ordinance be evaluated to determine whether it "preserves wildlife habitat and natural beauty?" Who will make this evaluation?

R: If the temporary sign is small and easily moved by hand, it would not meet the definition of a "structure" and would not be subject to this provision. The Department will evaluate proposed sign regulations and will provide guidance in a model ordinance.

(m) Open fences

C42: Does this provision prohibit the erection of snow fences in winter?
R: No. Clarifying language was added in the definition of structure.

C43: On open sided and screened structures and open fences: How do they match? I'm not at all certain what we are trying to protect here. I know it's related to wildlife; but, which ones that would be impeded in a significant way by fencing to protect? Does that protection weigh significantly more than protecting a garden or children? The language used for those two concerns should take that into account.
R: Open and screened structures are allowed under statute, if certain requirements are satisfied, including restoration of half of the shoreland setback area. Open fences may be allowed in secondary buffer or any fence may be allowed if it is setback at least 75 feet.

(6) Setback reduction process
C44: Keep the reduced setback at a minimum of 50 feet, do not drop to 35 feet.
R: The setback may be reduced to 35 feet, but the footprint cap was changed so that as you get closer to the water, the maximum footprint decreases.

C45: For setback averaging, increase the location of adjacent structure to 150 feet from 100 feet.
R: Language was modified as suggested

C46: Does this provision make all nonconforming lots ineligible for the setback reduction process? Aren't these the lots that will benefit most from this process? If a lot is unbuildable because it is nonconforming and it doesn't qualify for the setback reduction process, it seems that such a lot would be left with little or no economic value. Are legal conforming lots with 6,500 square feet located on public sewer ineligible for the setback reduction process?
R: A lot is eligible for a reduced setback if it is at least 7,000 square feet in size. Lots that are less than 7,000 square feet in size may apply for a variance if a reduced setback is required. A lot of 6,500 square would be nonconforming and would require a variance if a reduced setback was needed.

NR 115.15 Shoreland vegetation

(3) Primary shoreland buffer
(a) Minimum area
C47: Reducing the primary shoreland buffer down to 35 feet from 50 feet will result in an inadequate buffer. Keep the buffer at 50 feet as proposed in previous drafts or we will be sacrificing environmental quality with these new standards.
R: In the November draft, the primary shoreland buffer was reduced to 35 feet from 50 feet, but impervious surface standards were added, and the provisions managing vegetation in the primary buffer were improved to off-set the reduction in depth of the primary buffer. Counties can still adopt provisions for a deeper buffer if they wish.

C48: The 50-foot primary buffer was a good idea, but I can live with 35 feet since apparently so many counties are able to get shoreland restorations into effect with 35 feet as a basic parameter.
R: Please refer to response for Comment 47.

C49: Keep the primary shoreland buffer at 35 feet – studies have not yet shown the difference between 35 feet and 50 feet. Counties can still adopt a buffer with 50 feet of width if they want.
R: Please refer to response for Comment 47.

C50: Propose two standards – a 35-foot buffer with little vegetation removal, and a 50-foot buffer with more tree removal.

R: Please refer to response for Comment 47.

C51: Based on my review of the literature, the earlier proposal to require a 50 foot primary buffer, and to encourage the restoration of that buffer, is not only more protective of the receiving bodies of water, but necessary to achieve their protection. While there is no definitive research that shows a 35 foot buffer achieves substantially less protection than a 50 foot buffer, virtually all research notes that on slopes greater than 3%, the buffer width must be increased to maintain its protective functions.

An ideal standard would require increasing primary buffer width as the slope increases. Unfortunately, I don't see that as feasible. Since one of our objectives in this re-write is to make the rules more enforceable, there are two workable alternatives. The first, and the one I prefer, is to require the primary buffer to be 50 feet in width, as measured from the OHWM. This recognizes the fact that most shoreland property is not level, and that a 35 foot buffer is likely inadequate to function effectively. The alternative is to retain the 35 foot buffer standard for lots with an average slope less than 3% within 75 feet of the water, and require a 50 foot primary buffer in all other cases. Clearly, this would add some complexity to administering the rule, which is why I prefer the 50 foot standard apply to all. I urge you to put the 50 foot primary buffer standard and its justification out for comment and see what results.

R: The depth of the primary buffer, like the shoreland setback, is measured horizontally. This means that as the slope increases, the buffer depth actually increases as measured along the lay of the land.

(b) Access corridor

C52: There should not be different standards for the widths of access corridors for lots with less than 200 feet of frontage and lots with more than 200 feet of frontage. There should be just one standard.

R: The two standards were a compromise of proposed regulations. A county may use one standard if they use the more protective 20%.

C53: The size of access corridors should be kept to a minimum to minimize destruction of the primary buffer. People prefer a natural-looking shore to one that is disturbed by wide access corridors and marred by excessive landscaping. I support the provisions of the draft of Nov.16 regarding access corridors. A maximum corridor width of 40 feet on lots under 200 feet wide is a reasonable compromise. 40 feet is plenty of width for practically all lots. I have never seen a path or stairway that needed to meander more than 40 feet sideways. The primary buffer is only 35 feet deep, and any clearing wider than 40 feet is a field or a lawn, not a corridor. Suggestion: add a maximum corridor width of 200 feet on lots over 200 feet wide. There should be "performance standards" for access corridors and the plan for a new access corridor should be submitted and approved by the county. A plan for the access corridor(s) should show pathways, stairways, and the removal of trees and shrubs. The draft covers "performance" well with the paragraph about vegetation management.

R: Please refer to response for Comment 47.

C54: These standards are a big improvement over earlier versions. However, in keeping with the effort to provide flexibility where local situations merit it, I encourage the DNR to design a system where landowners can be granted approval to remove a small number of trees to provide at least some view of the water in cases where no view is otherwise possible. Clearly this needs to be carefully circumscribed so as not to open the door to the sort of clear-cutting we have witnessed under the current rule.

R: Please refer to response for Comment 47.

(c) Vegetation management in the access corridor & (d) Vegetation management outside the access corridor

C55: If a property owner needs to replace a tree, is it an "in kind" replacement, i.e. a 12-inch in diameter tree for a 12-inch diameter tree?

R: Language clarified that "in kind" replacement is not required.

C56: Are these provisions enforceable? Who will be monitoring whether or not someone cuts down a tree larger than they are supposed to?

R: The provisions are enforceable and easy to for public to understand and implement. The enforcement is the responsibility of the county zoning office, which in many cases rely on complaints and site inspection to determine compliance.

C57: Can an alternative cutting plan option be included?

R: Language for an alternative vegetation management plan was included as suggested.

C58: The buffer provision conflict with recommendations from our health department (Vilas) to prevent the transmission of Lyme's disease and the West Nile virus.

R: Department staff contacted the Vilas County public nurse office and was unable to find any health recommendations that would conflict with NR 115 proposal.

C59: The provision for vegetation removal in the access corridor are too restrictive. The purpose of an access corridor are to provide access. Trees larger than 6 inches may need to be removed. We understand that the Department will clarify that this requirement will not require replacement with comparably sized trees, however, we still believe the provision should be removed or limited to a requirement for revegetation.

R: Please refer to response for Comment 47.

(e) Existing lawns

C60: Any lawn outside the view corridor and in the 35' buffer area must be slated for revegetation. All must share in the responsibility and be equal under the law.

R: Provision requires eventual compliance with buffer regulations, but is triggered by actions of the property owner.

NR 115.17 Land disturbing activities

(4) Permit exemption

C61: Can Commerce erosion control permits also be exempted?

R: An exemption for commercial construction sites that comply with the requirements in s. Comm 61.115 was added because s. Comm 61.115 requires the preparation of a site-specific soil erosion control plan and storm water management plan. Other permits issued under ch. Comm 61 may

not be issued by state or county building inspectors and do not require the preparation of site-specific plans.

C62: Permit exemption allows the department to waive the requirement of a County zoning permit if a permit has been granted from the department. I do not believe the department has the authority to interfere with a county's revenue stream. County personnel will ultimately end up supervising and we have to justify our time with permit fees.

R: Proposed language does not allow the Department to waive permit requirements, rather it allows counties to determine if an activity that already has a permit from the Department can be exempt from the county permit. The decision is the county's, not the Department's. A county may also require a filing fee to avoid a loss in revenue.

NR 115.19 Nonconforming uses and structures

(1) Purpose

C63: As stated previously, we question the department's legal authority to require counties to regulate nonconforming structures.

R: Department disagrees with proposed interpretation of authority granted by statutes and requirements of common law. The proposal for nonconforming structures is based on statutory objectives of program, recommendations of advisory committee members, and comments received from the public at listening sessions.

C64: The purpose section should be amended to include "allowing property owners have reasonable use and enjoyment of their property" and "expanding the tax base of counties."

R: The purpose statement reflects the statutory objectives of the program.

(3) Nonconforming principal structures

C65: At this time I would like to raise opposition to the use of the word "nonconforming" in this document. The Supreme Court has clearly separated a nonconforming use (commercial establishment in a residential zone) from a structure built in a previously compliant location. Ziervogel, March 2004) This document elevates structures considered by some counties to be previously compliant to the status of nonconforming with tremendous legal consequences. It is vanity on the part of the state to think they can designate a structure nonconforming, and therefore slated for removal at some future time, from an arbitrary and moving point called the ordinary high water mark. Grandfathered, previously compliant, previously legal, preexisting legal, historically compliant or nonconforming are designations left to the counties in statute and should remain so. The basic policy of early terminations of nonconforming uses no longer applies to residential structures in residential districts unless the county wishes it to be.

R: Please refer to response for Comment 63.

(c) Expansion

C66: Put the standard back to 50 feet instead of 35 feet to allow expansions. By allowing structures between 35 and 50 feet to expand, people with structures closer than 35 feet will be upset that they cannot expand. Maybe just allow replacement between 35 & 50 feet, and only allow expansion beyond 50 feet.

R: Language was modified similar to suggestion to allow horizontal expansion for structures set back at least 35 feet, and to allow vertical expansion and replacement on new foundations for structures set back at least 50 feet.

C67: Allow structures with irregular footprints (L-shaped or U-shaped) to construct expansion to "fill-in" the footprint, regardless of whether it is on the waterside or the landward side of a structure.
R: Language modified similar to suggestion.

C68: Allow expansions on a sliding scale – the closer you are to the water, the smaller the total footprint can be when expanding. This may be more acceptable to many people since there are no large jumps in the amount of expansion allowed for certain different positions of houses. Note that the formula is based heavily on a line 50 feet from the water. The 50 feet should stay, not be changed to 35, and the 50 feet in the formula corresponds to the 50 feet in the Nov.16 draft.
R: Language modified similar to suggestion.

C69: The rule continues to restrict expansion or replacement of a nonconforming principal structure landward of the 75-foot setback line. We anticipate a great deal of public and legislative opposition to this restriction.
R: To meet statutory and common law requirements, the Department feels it is necessary to regulate the entire structure, not just a portion of a structure, if the structure as a whole does not meet the shoreland setback requirements. The proposal governing expansion of nonconforming structures was modified to allow those structures that are set back farther to expand more than those structures that are closer to the water.

C70: The present rules for expanding and replacing non-conforming principal structures (houses) really need do to be clarified and give the owner freedom to improve a non-conforming house to make it comfortable and pleasant, but without destroying too much shoreland. The 50% rule really is inadequate and impractical to administer.
R: This is a goal of the proposed regulations.

C71: The draft of Nov.16 presents reasonable rules for expanding or replacing non-conforming houses. It provides a whole lot more freedom and options for property owners, even re-building foundations. The draft is reasonable in not allowing forward or sideways expansion within 75 feet of the lake. Let's hold firm on that. One suggestion, however, under replacing: don't allow foundations unless one exists. Nobody should be allowed to dig a fresh foundation within 75 feet of the lake.
R: Language was modified similar to suggestion.

(6) Mitigation

C72: Requiring mitigation in the form of improving/upgrading the primary buffer when non-conforming houses are expanded or replaced is an important program. The Nov.16 draft is reasonable, requiring mitigation proportional to the expansion or alteration of the house.
R: This is a goal of the proposed regulations.

C73: It is not clear how counties are supposed to interpret the proportionality language. What is it supposed to be proportional to?
R: Language was modified to provide clarity. Guidance can also be given in a model ordinance.

C74: Can counties require more mitigation than proportional to the impacts? Should it say "at least" proportional to?
R: Language modified as suggested.

C75: Why does the mitigation focus on restoration? What about preservation?

R: Language recognizes both restoration and preservation.

C76: Can the mitigation system adopted by the county require no buffer restoration?
R: No. Buffer restoration is required for Level 2 activities.

C77: Should mitigation system require review or inspection of POWTS?
R: Language added similar to suggestion.

C78: The return of this provision to this draft is welcome. Mitigation, especially protection or restoration of the primary buffer, is a key part of the trade-off for allowing existing homes and cabins to remain even though they are closer than 75 feet from the water. In Par. 2 the second sentence should be amended to read "…in the plan is roughly proportional to the proposed project *impact*." In addition, the DNR should be prepared to provide both guidance on how to make that determination, as well as guidance as to what other types of mitigation might be considered (removal of secondary structures, reduction of surface runoff into water body, etc.).

When mitigation is discussed, you should be clear that the first goal is to protect or restore the primary buffer. This is the key tool to protect and restore water quality and should receive priority over other forms of mitigation. Finally, you need to clarify that mitigation need not be required if the zoning authority determines the landowner already has adopted all of the relevant mitigation practices that would otherwise be required for permitting.

R: Language modified similar to suggestion

NR 115.21 Impervious surfaces

(1) Purpose

C79: The purpose section should be amended to include "allowing property owners have reasonable use and enjoyment of their property" and "expanding the tax base of counties."
R: Please refer to response for Comment 64.

(3) Impervious surface limit

C80: Support inclusion of impervious surface limit – it moved towards what the program is intended to accomplish.
R: Please refer to response for Comment 47.

C81: Is a gravel driveway an impervious surface?
R: Yes. Please refer to response for Comment 5.

C82: Is "no increase" an attainable standard?
R: Several communities in Wisconsin have been using the "no increase" standard for some time. Nonetheless, this requirement has been modified so that the standard is only required to be achieved to the "maximum extent practicable," as that phrase is defined in s. NR 151.002 (25).

C83: Instead of allowing 20% impervious surfaces, and then "no increase", just allow "no increase" across the board.
R: The provision has been modified as suggested.

C84: Should this apply to just lots or portions of lots that are 300 feet or closer to the water? For instance, what if you have a really big lot that extends 1,000 feet back, but all the impervious surfaces are right next to the water?

R: Studies on the impacts of impervious surfaces focus on the entire watershed, of which the shoreland zone may only be a small part. To be effective, the impervious surface limit should apply to entire shoreland zone.

C85: Does the 20% limit accommodate the "typical" development of a shoreland lot?

R: Yes. A 20,000 square-foot lot could have 4,000 square feet of impervious surfaces, which should accommodate the average-sized house built in 2004 (2,272 s.f.) and a driveway, as well as other accessory structures. On a 10,000 square-foot lot, the lot could accommodate 1,500 square-foot house and a driveway, with nearly 200 square feet still available for accessory structures.

C86: Is a structure nonconforming if it exceeds the 20% limit? What happens if an existing lot is more than 20% impervious surfaces?

R: A structure is not nonconforming if the 20% limit is exceeded. When the property owner receives a permit to construct, expand or replace a structure, the property must then be brought into compliance.

C87: We are concerned that a "no increase" standard for stormwater discharge will not be practicably attainable. County representatives at the advisory committee meeting said that is already done in some other areas, but calling something "no increase" and actually attaining that threshold may actually be two different things.

R: Please refer to response for Comment 82.

C88: Regarding impervious surfaces and controlling run-off, having a development limit of 20% of the lot area is a good idea. The 20% limit not only controls run-off, it will help reduce destruction of the natural setting and of wildlife habitat near the lake. The 20% must apply within 300 feet from the lakeshore to be effective, however. (For a lot 100 feet wide and 300 feet deep, 20% equals 6000 square feet, plenty for a house, garage and driveway.) If the 20% is applied to the whole lot 100 feet wide and 1000 feet deep, 20% equals 20,000 square feet, which is 89% of the area between 75 and 300 feet where building is likely to take place. Allowing 20,000 square feet impervious surface near the 75-foot set-back can't be good for run-off to the lake! In addition, there should be a requirement that best management practices to reduce/prevent run-off be implemented as part of the construction.

R: If we limit the impervious surface standard to the first 300 feet of the shoreland zone, the impervious surface limit will not apply to remainder of the shoreland zone, and studies conducted on the impacts of impervious surfaces have shown the entire watershed contributes to water quality problems, not just the first 300 feet.

C89: Regarding allowing impervious surfaces over 20%, requiring that no additional run-off be created when new construction is done is a good idea, and from the discussion at the meeting it is practical to implement. Run-off would remain the same as when the lot was undeveloped. The draft of Nov.16 is very good on this.

R: Please refer to response for Comment 82.

C90: Impervious surface requirements set at 20%. Areas of the state that have deep well drained soils should not have these requirements. Areas that have heavy soils should probably have requirements less than this number.

R: Please refer to response for Comment 83.

C91: Since the goal of this standard is to reduce or eliminate the harmful impact of surface runoff on the receiving water body, it may be simpler to adopt the suggestion that any permitted new building or change to existing structures within the shoreland zone must be done in a way that does not increase runoff from its existing level. Based on comments from several committee members, several counties have such a restriction and are applying it with little difficulty.

R: A county could adopt this standard, but the proposed minimum standard is 20% for impervious surfaces.

NR 115.23 Adoption of administrative and enforcement provisions

C92: In the department's response to our previous comments about this provision in s. NR 115.23(7), it indicated that this provision "clarifies existing zoning practice and common law." This is untrue. Both state statutes and common law recognize the ability of counties to grant special exceptions where the use is not prohibited by the zoning ordinance. (See Fabyan v. Waukesha County Bd. Of Adjustment, 246 Wis. 2d 851, 632 N.W.2d 116 (Ct. App. 2001)). In defining when a special exception can be granted, the court stated that a special exception "authorizes a use which is permitted by the zoning regulations, subject to the issuance of such a permit. Thus, . . . a special [exception] results in the establishment or maintenance of a use in the location and under the circumstances mandated by the ordinance." ¶16, at 860-61 (citing 3 Robert M. Anderson, American Law of Zoning §20.03, at 416 and §21.02, at 695). The proposed NR 115.23(7), however, seeks to strip away a county's discretionary authority to establish its own standards within its zoning ordinance for granting special exceptions. This discretionary authority was specifically granted to counties by the legislature and upheld by our courts. An attempt to eliminate this statutory authority through administrative rules is a violation of state law. (*See* Ziervogel v. Washington County Bd. of Adjust., 2004 WI 23, 269 Wis. 2d 549)

R: Language in this subsection, which has been renumbered as sub. (8), was clarified to provide that counties may not substitute the conditional use (special exception) permit process in situations where a variance is required "because the use or activity is prohibited or is not allowed because specified standards are not satisfied." This standard is consistent with the holding in Fabyan that you cite.

NR 115.25 Department duties

General Comments

C93: Throughout the rule, some provisions contain the clause "except where a variance has been granted" (e.g. shoreland buffers) and other provisions do not (e.g. nonconforming principal structures). This needs to be treated uniformly to prevent an argument that variances may not be granted for some areas. Our preference would be to delete the clause throughout.

R: The language "except where a variance has been granted" is used uniformly through the proposed code. In the nonconforming section, it appears at the end of subs. (3) and (4).

C94: This document is going to be very expensive to administer and it will impact the tax base in ways that will only come to light after implementation. If the goal was to improve water quality and scenic beauty, the worst of the waters will remain the same and there will be no effect on the best of the waters.

R: In s. NR 115.23 (3), counties are authorized to provide for a system of permits and fees. The burden of implementing this program should be placed on permit fees, not property taxes. There are multiple goals to this revision, including developing standards that better achieve the statutory objectives of the program, providing flexibility to property owners, and providing flexibility to counties who administer the program.

C95: First an observation from the last meeting. The matter of "good science " rose up again. As a past research scientist and once member of the WDNR Research Advisory Committee and other advisory committees I think I understand the difference between well researched subjects and interesting studies resulting in someone's opinion. Those opinions rather than the statistically proven results often are put in a popular publication or newspaper. There is a certain amount of the last at the table. Care should be taken to avoid the snare of using opinions to make public policy.

R: The Department has provided throughout the process a variety of research and other information relevant to this topic. It is expected that Advisory Committee members will have opinions on this topic also, and that was part of the reason they were invited to be on the committee – to ensure a broad range of interests and opinions were represented. The process used by the Department for the rule revision has been designed to be as inclusive as possible through the process, so that a single opinion does not determine a policy.

C96: We need to be fair and realistic about the freedoms of people to own property. Those are two of the actions that we were warned against at the first meeting by several at the table. Unintended consequences need to be thought out as best we can. An awful lot of forested shore land was sold and cleared for lots because of the taxation policies of the last century. Will something of that nature happen from the restrictions we are now developing? I hope not.

R: By using an Advisory Committee, the Department has tried to be pro-active in ferreting out unintended consequences. It is expected that in the public hearing phase, additional comments will help in identifying unintended consequences.